STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 26, 2014
v	No. 315372 Lapeer Circuit Court
TERRY JAMES SCHWARZ, Defendant-Appellant.	LC No. 11-010634-FC

Before: JANSEN, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted[1] his jury trial convictions of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(a), criminal sexual conduct in the second degree (CSC II), MCL 750.520c(1)(a), and failing to comply with the Sex Offenders Registration Act, MCL 28.729(1)(a). Defendant was also convicted of the misdemeanor violation of residing within a student safety zone in violation of MCL 28.735(2)(a). Defendant was sentenced to life imprisonment without the possibility of parole under MCL 750.520b(2)(c) for his CSC, first degree conviction, and to concurrent sentences of 15 to 22½ years for his CSC, second degree conviction, and 3½ to 6 years for failure to comply with registration requirements, and 365 days for the misdemeanor conviction. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant's convictions arose out of allegations that he sexually assaulted a five-year-old girl with whose mother and "aunt" (actually the victim's cousin) he occasionally resided. Specifically, the victim informed her grandmother during a "good touch/bad touch" conversation that defendant had touched her in the "private part" in front, which she identified as her vagina at both the preliminary examination and trial. The victim testified that defendant had placed two fingers inside her vagina and flipped or spun them around on the area that she used to "go pee." The victim also testified that this occurred at her "aunt's" house. The victim claimed that the sexual assaults happened at least ten times at her aunt's house, as well as one time at her

[1] *People v Schwarz*, unpublished order of the Court of Appeals, issued November 25, 2013 (Docket No 315372).

mother's house. On each occasion, the assaults occurred while she was sleeping on the couch with defendant.

After the victim told her grandmother about the touching, the victim and her grandmother awakened the victim's father and told him. They then proceeded to the victim's mother's residence to inform her. The victim's mother contacted the police.

During the ensuing investigation, defendant eventually admitted to sleeping on the couch with the victim approximately ten times at the victim's aunt's house, but denied any sexual contact or other inappropriate contact between him and the victim. Defendant had previously been convicted of CSC charges involving his five-year old daughter; a condition of his probation was that he was forbidden any contact with anyone under the age of 17. Defendant was also not permitted to reside at a residence within 1000 feet of a school; the evidence established that the victim's aunt's house, in which defendant stayed from time to time and where most of the alleged sexual misconduct occurred, was within 1000 feet of an elementary school.

Defendant's first trial ended in a hung jury. The prosecution recharged defendant (adding additional crimes), and he was convicted following the second trial. While everyone who testified at the first trial testified at the second trial, the prosecution also called two additional witnesses at the second trial. One of these witnesses was the doctor who performed a forensic examination of the victim; the other was an expert witness, Jennifer Wheeler, who testified regarding how victims of sexual abuse react following the abuse, and, in cases in which the victim tells someone, how the disclosure process generally occurs.

Between trials, the prosecution filed a motion in limine seeking to preclude defendant from introducing any evidence or eliciting testimony regarding Carl King. During the first trial, defendant's counsel cross-examined the victim's aunt regarding her initial belief, when told of the victim's allegations, that King may have been the individual responsible. This belief was based on the fact that King had previously been accused of improper contact with the victim. However, King was ruled out as a suspect because of the victim's clear identification of defendant as the perpetrator and because King had been cleared of any wrongdoing in the first investigation, as the victim specifically denied that he ever did anything inappropriate with her.

On appeal, defendant makes three separate arguments regarding why his convictions should be overturned. First, defendant argues that the trial court erred when it failed to permit him to introduce evidence that King may have been the culprit and that therefore defendant was wrongfully accused. Second, defendant argues that the trial court erred when it permitted the victim's preliminary examination testimony to be read to the jury, as defendant claims on appeal that this was a prior consistent statement that does not meet any of the hearsay exceptions and therefore should have been excluded as it improperly bolstered the victim's in-court testimony. Third, defendant argues that the trial court erred when it permitted the expert witness to testify that "kids don't typically lie" about being sexually assaulted, as this testimony amounted to improper vouching for the victim's testimony. Defendant also argues as part of his third allegation of error that the prosecution compounded this error by referencing this improper testimony during its closing argument, and that defense counsel was ineffective in failing to object to the improper testimony by Wheeler or the references to that testimony during the prosecution's closing argument.

II. EXCLUSION OF EVIDENCE

Defendant first argues that the trial court violated his constitutional right to present a defense when it failed to permit defendant to elicit testimony that the victim may have been assaulted by King, and that defendant was simply on trial because of misidentification. We disagree.

"For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Objections made by a party must be timely, and specify the same ground for challenge as the party asserts on appeal. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011). In this case, defendant argued, both during the motion in limine before the second trial and at the second trial, that the evidence regarding King was relevant. Therefore, to the extent defendant argues that the trial court made an evidentiary error when it failed to permit defendant to introduce evidence pertaining to King, this issue has been preserved. However, defendant has also argued on appeal that the failure to permit the evidence pertaining to King violated his constitutional right to present his defense. This specific objection was never raised below, and therefore, to the extent defendant raises a constitutional argument, the issue has not been properly preserved. See *Kimble*, 470 Mich at 309.

"While a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion, a preliminary or underlying issue of law regarding the admissibility of the evidence, such as whether a rule of evidence bars admission, is reviewed de novo." *People v McDade*, 301 Mich App 343, 352; 836 NW2d 266 (2013). Likewise, "[w]hether a defendant's right to present a defense was violated by the exclusion of evidence is a constitutional question" and is ordinarily subject to de novo review. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 537-538; 775 NW2d 857 (2009). However, unpreserved objections to a trial court's evidentiary rulings, including those affecting constitutional rights, are reviewed for plain error affecting the defendant's substantial rights. *People v Fackelman*, 489 Mich 515, 537; 802 NW2d 552 (2011).

The trial court did not err when it ruled that testimony regarding King as a potential perpetrator of the crime was not admissible. We agree with the prosecution that *People v Williams*, 191 Mich App 269; 477 NW2d 877 (1991), although not on all fours with the instant case, is persuasive and controls the resolution of this issue. In *Williams*, the defendant was convicted of 3rd degree CSC of a 14-year-old babysitter. Like in this case, the defendant "denied any sexual conduct with the victim." *Id.* at 271. On appeal, the defendant argued that "the trial court erred in refusing to allow him to inquire about an alleged sexual assault of the victim by her uncle five years before the trial." *Id*. at 272. The defendant wished to elicit this testimony in order to "impeach the credibility of her accusation." *Id*. This Court held that, "to the extent that [the] defendant desired and was able to introduce evidence that the victim made a prior false accusation of rape," such evidence may be admissible under *People v Hackett*, 421 Mich 338, 348-349; 365 NW2d 120 (1984). *Williams*, 191 Mich App at 272-273. In order for such evidence to be admissible, however, "the defendant is obligated [] to make an offer of proof with regard to the proposed evidence and to demonstrate its relevance to the purpose for which the evidence is sought to be admitted." *Williams*, 191 Mich App at 273, citing *Hackett*, 421 Mich at 350. In holding that defense counsel failed to "offer any concrete evidence that the

victim had made a prior false accusation of being sexually abused," this Court noted that counsel "merely wished to engage in a fishing expedition in hopes of being able to uncover some basis for arguing that the prior accusation was false." *Williams*, 191 Mich App at 274 (footnote omitted). Consequently, this Court held that "if [a] defendant had evidence of a prior false accusation, that could be presented to the court," but that the trial of the defendant was not the appropriate time "to determine whether [a] prior accusation was true or false." *Id*.

This rationale applies with even more force to the instant case, where, instead of merely seeking to impeach the victim, defendant sought to show that King actually committed the crime of which defendant was accused. Here, there was no evidence that the victim ever accused King of sexual assault. Rather, there was an allegation made by a third party that King may have had improper contact with the victim, her brother, and a neighbor. The evidence at the first trial established that the victim's mother had "said [the victim] told her about Carl King," but during the forensic interview of the victim regarding those allegations, she denied ever making those statements. The officer-in-charge of this investigation also testified that, in reviewing the previous investigation regarding King for the first trial, which included a review of the victim's forensic interview, he saw no evidence supporting any crime having been committed by King. In addition, the victim specifically and consistently identified defendant as the assailant in this case. The victim also testified that all but one of the many assaults occurred at the home where defendant resided. King never resided at that location. Based on this evidence, defendant simply could not establish any relevance to the previous sexual assault investigation against King in the context of this specific case; rather, defendant sought to embark upon the same sort of "fishing expedition" this Court disapproved of in *Williams*, 191 Mich App at 274.

We also find defendant's argument that he was denied his right to present an effective defense to be without merit. In support of this argument, defendant relies on *Davis v Alaska*, 415 US 308, 318; 94 S Ct 1105; 39 L Ed 2d 347 (1974), for the general proposition that a defendant can be denied an effective defense when the court limits cross-examination. However, in that case, "defense counsel sought to show the existence of possible bias and prejudice [of the identifying witness], causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner." *Id*. at 317. That situation is wholly different from the case at bar, where defendant wished to call into question the victim's testimony and identification through the use of a collateral witness who had admitted to the police initially that she thought someone other than defendant, such as King, may have committed the sexual assault. Unlike the witness in *Davis*, there is no indication in this case that the victim had any bias or prejudice against defendant at any point when she consistently identified him as the perpetrator. Further, to the extent defendant wished to cast doubt on whether the victim's aunt believed her initially, defense counsel asked the aunt during cross-examination whether she initially believed defendant did it, and she responded by saying "a hundred percent? No."[2]

[2] We also find defendant's cursory citation to *Michigan v Lucas*, 500 US 145; 111 S Ct 1743; 114 L Ed 2d 205 (1991), to be inapposite. There, "[t]he sole question presented for [the Court's] review [was] whether the legitimate interests served by a notice requirement can ever justify

Accordingly, we hold that the trial court did not abuse its discretion when it ruled that defendant could not elicit any testimony regarding allegations of sexual abuse against the victim by Carl King, or any other individual.[3] We also hold that the exclusion of this testimony did not violate defendant's constitutional right to a complete defense.

III. ADMISSION OF PRELIMINARY EXAMINATION TESTIMONY

Defendant next argues that the trial court erred when it permitted the victim's preliminary examination testimony to be read to the jury during the second trial. In this regard, defendant argues on appeal that the testimony should have been excluded as improper hearsay given that it was a prior consistent statement and that no hearsay exception applied. We note that this argument differs from the argument defendant made below, which was that the testimony should be excluded because it was "piling on" and unnecessarily cumulative. Because defendant did not object on hearsay grounds in the trial court, this issue has not been properly preserved for our review. *Kimble*, 470 Mich at 309. We thus review defendant's claim for plain error affecting substantial rights. *Fackelman*, 489 Mich at 537.

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally prohibited unless it may be admitted under an exception to the hearsay rule. A declarant's former testimony at another hearing of the same or different proceeding may be admitted if the declarant is unavailable as a witness. MRE 804(b)(1).

MRE 804(a) provides:

> **(a) Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant--
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) has a lack of memory of the subject matter of the declarant's statement; or

---

precluding evidence of a prior sexual relationship between a rape victim and a criminal defendant." *Id.* at 151. Obviously, in this case, there is no indication that the victim, a five-year-old at the time of the assaults, had any prior sexual relationship with defendant. Further, defendant was not attempting to introduce evidence of a sexual relationship between defendant and the victim. *Lucas* is therefore inapplicable to the instant case.

[3] We note that the trial court's initial order indicates it would consider an offer of proof related to such testimony; it does not appear that such an offer of proof was made. At trial, defendant reiterated his argument at the motion hearing that testimony regarding King was relevant, but offered no new or additional proof of relevancy.

> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.
>
> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

In this case, the prosecution read the victim's preliminary examination testimony to the jury. The trial court stated its reason for allowing the introduction of the preliminary examination testimony as follows:

> Ladies and gentlemen of the jury, what happens in these kinds of circumstances is many times when you're dealing with minor children sometimes as time goes on, their memories lapse, they become nervous, they don't remember everything and sometimes their testimony is not different but is not exactly the same as it was at earlier times.
>
> [The victim] did testify at a preliminary exam, which was a separate hearing back on February 17, 2011, and based upon that testimony that was given here in court, it doesn't necessarily contradict her testimony that was given earlier; however, there were more details in regard to what happened.
>
> Mr. Beatty, in regard to supplement [sic] that testimony during this trial, wishes to read those portions of the preliminary exam that he feels is relevant; and the Court has determined that due to the passage of time, due to her tender years, due to the circumstances of her being front of a jury — and, again, at the preliminary exam there is no jury. There's simply the judge, the lawyers and some people. There is no jury — that [the victim's] testimony at that time can be heard by you in the case in chief in your cause of determining the evidence in this matter.

After the testimony was read, the trial court noted for the record that defendant had objected to the testimony at the sidebar, but agreed to make a record of those objections after the reading of the testimony. The prosecution then made the offer of proof regarding the reason for the testimony. Specifically, the prosecution noted that the victim was not able to "provide the level of detail that she provided on the previous occasion," making her unavailable under MRE 804(a). In response, defendant agreed that "there [were] some difference[s] in testimony, whether he was snoring or wasn't snoring, but [that] the differences were so minute that I don't think they were ever on a material point; that all the read-back did was to pile on, to repeat what the jury already heard." The court then stated the reasons why the court permitted the preliminary examination testimony to be read back:

> The Court's position on this matter is the Court did read everything back. The Court certainly read all of the direct testimony and cross-examination at the preliminary exam. The Court did not read only excerpts. The Court read the entire section. So, again, if there were inconsistencies that were brought up by defense counsel at the preliminary exam and those inconsistencies are brought up again, what she testified to live in court today, clearly defense counsel has that opportunity. So the Court made sure everything was read.
>
> The Court does indicate there was one major inconsistency in regard to indicating that he was spinning with two fingers on where she goes pee. She used [sic] of the word two fingers where she peed. She did not use the words two fingers here. She did not use the word spinning. She used the words flicking, I believe today, where she used the word spinning at the preliminary exam, and indicating, clearly, based upon Dr. Gullekson's testimony that the area of pee is within the genital opening, not necessarily the vaginal opening. Those are areas that she did not go into or did not recall because of the passage of time because of her tender age and all those issues.

In support of upholding the trial court's ruling permitting the preliminary examination testimony to be admitted into evidence, the prosecution has relied on *People v Duncan*, 494 Mich 713, 730; 835 NW2d 399 (2013), and *People v Edgar*, 113 Mich App 528, 536; 317 NW2d 675 (1982). In *Duncan*, 494 Mich at 729, our Supreme Court found that the trial court abused its discretion in refusing to admit the victim's preliminary examination testimony on the grounds that the victim, a four year-old, was "unavailable" at trial because of "the severity of her emotional distress" at trial, which led to the trial court's holding that she was incompetent to testify. Our Supreme Court stated:

> We recognize the case-specific nature of the inquiry into whether a witness suffers from a "then existing mental infirmity." In this case, the severity of RS's emotional distress made it impossible for her to testify. This is highlighted by the fact that she had previously been able to give testimony about the alleged sexual contacts at issue in this case. Before trial courts hold that a child has a then existing mental infirmity, we urge them to use, when appropriate, the tools in our court rules and statutes to accommodate young witnesses. [*Id.* at 729.]

In *Edgar*, 113 Mich App at 535, this Court held that the trial court abused its discretion in not admitting preliminary examination testimony of the child victim after finding her incompetent to testify at trial. This Court noted that a subsequent inability to testify at trial does not render testimony made at a preliminary examination inadmissible, and that the child victim was "unavailable" under MRE 804(b)(1) due to either an honest lack of recall or fear of the defendant. *Id.*

Both *Duncan* and *Edgar* dealt with a situation where the victim was found incompetent to testify and indeed gave no testimony at trial. This case is wholly different, as the victim was able to testify and answer questions during the trial; she just happened to answer some of those questions slightly differently than she had at the preliminary examination. For example, the victim testified at the preliminary examination that defendant was not snoring during the sexual

assaults, whereas at trial she testified that defendant was snoring. Similarly, at the preliminary examination, the victim gave more detail regarding the manner in which defendant touched her vagina, stating that he used two fingers and spun them around on the area where she goes pee, but at trial she testified it "felt like a crayon inside of [her] vagina." She also testified at trial that defendant had touched her more than ten times at her aunt's house, whereas during the preliminary examination she was not as definitive in stating that it occurred more than ten times. While the defense counsel argued that these were not substantive differences, the trial court disagreed, especially with regard to the difference in testimony describing the nature of the sexual contact defendant had with the victim.

Thus, unlike the situations in *Duncan*, 494 Mich at 729, and *Edgar*, 113 Mich App at 535, it is clear that the victim in this case was able to testify in detail about many of the events that occurred. She was also found to be competent to testify in this case, unlike the victims in both *Duncan* and *Edgar*. There is no evidence that the trial court engaged in any sort of case-specific inquiry into the victim's unavailability, nor attempted to avail itself of other "tools in our court rules and statutes to accommodate young witnesses." *Duncan*, 494 Mich at 729.

In short, the record reflects no evidence in support of the trial court's implicit conclusion that the victim was "unavailable" under MRE 804(a).[4] Minor differences between preliminary examination testimony and trial testimony do not fall under any of the listed exceptions in MRE 804(a). To hold otherwise would be to essentially allow the reading of preliminary examination testimony in any trial where a witness gives even slightly different testimony than he or she did at the preliminary examination. We thus find that the trial court admitted the preliminary examination testimony in error.

However, defendant cannot establish that the error affected his substantial rights. *Jones*, 468 Mich at 355. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Carines*, 460 Mich at 763-764 (quotation marks and citation omitted).

Both our Supreme Court and this Court have consistently held that "improperly admitted hearsay evidence constitutes harmless error when it is merely cumulative of other properly admitted evidence." *Solomon v Shuell*, 435 Mich 104, 146; 457 NW2d 669 (1990); *People v Van Tassel (On Remand)*, 197 Mich App 653, 655-656; 496 NW2d 388 (1992); *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988). In addition, we note that the preliminary examination testimony was also offered at the first trial, which ended in a hung jury, thereby undermining defendant's argument that its admission in this case was likely outcome determinative. Indeed, as the trial court noted when admitting the testimony,

[4] We note that although the prosecution argued that the victim was "unavailable" due to a lapse in memory, the trial court never used the word "unavailable." Nonetheless, it does appear that the admission was premised on the unavailability of the victim due to the victim's alleged lapse of memory and nervousness.

> the Court doesn't see this being piling on. The Court certainly allowed the cross-examination where a lot of inconsistencies were shown again. Deficits in her testimony and in her recollection were also brought out by defense counsel, so the Court allowed that testimony, all of it, to be heard by the jury again.

Additionally, the victim's trial testimony alone was sufficient to support defendant's convictions. *People v Brantley*, 296 Mich App 546, 551; 823 NW2d 290 (2012). Further, defendant himself corroborated a portion of the victim's testimony when, during questioning by the officer in charge, he admitted that he had slept on the couch with the victim ten times at the house where both he and she stayed from time to time. Moreover, the victim's grandmother testified in a manner that corroborated most of the victim's testimony, and, even absent the victim's testimony, would have provided sufficient evidence to permit a jury finding of guilty of the sexual assaults of which he was convicted.

Thus, although we find that the trial court erred when it permitted the preliminary examination testimony to be read into evidence during this trial, the error was harmless.

IV. ADMISSION OF EXPERT WITNESS TESTIMONY

Defendant's final argument on appeal is that the trial court erred in permitting the opinion testimony of the prosecution's expert witness, Jennifer Wheeler. Specifically, defendant argues that Wheeler improperly bolstered the victim's testimony when Wheeler testified that "typically kids don't lie about sexual abuse," and that this error was compounded when the prosecution discussed it during his closing argument. Defendant never objected to Wheeler's testimony or the prosecution's closing argument during trial. Thus, this issue has not been preserved for our review. *Kimble*, 470 Mich at 309. Likewise, to the extent defendant claims that the failure to object constituted ineffective assistance of counsel, defendant failed to move either the trial court or this Court for a new trial or evidentiary hearing, and our review is therefore limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant has alleged error in permitting Wheeler to testify on direct examination that "typically kids don't lie about sexual abuse." He has also alleged that the following portion of the prosecution's closing argument was improper:

> You remember the testimony of Jennifer Wheeler, who's done thousands of these interviews and thousands of cases of sexual abuse? Kids that young generally do not lie about abuse. It doesn't happen. The statistics don't bear that out.

Defendant claims, relying on *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), and *People v Adams*, 122 Mich App 759, 767; 333 NW2d 538 (1983), rev'd on other grounds 421 Mich 865 (1985), that this testimony and argument improperly bolstered the victim's credibility and therefore "usurp[ed] the function of the jury." However, we find both of these cases to be distinguishable and unpersuasive. First, neither case dealt with the testimony of an expert. *Buckey*, 424 Mich at 7 n 3; *Adams*, 122 Mich App at 767. Second, in *Buckey*, 424 Mich at 7 n 3, 17, the prosecutor specifically asked the witness whether other witnesses were lying. In this case, it is undisputed that Wheeler was an expert, specifically called to provide expert opinion, and a review of her testimony clearly establishes that the prosecutor never asked her any

questions specifically about the victim, but focused solely on generalities regarding children's reactions when sexually abused.

In *People v Kowalski*, 492 Mich 106, 137 n 74; 821 NW2d 14 (2012), the Court noted that concerns that expert testimony might interfere with the jury's role regarding the weight and credibility of other witnesses' testimony did "not take account of safeguards typically applied to expert testimony" such as a limiting instruction to the jury to consider the expert's testimony only for a proper purpose. In this regard, the trial court in this case provided the following limiting instruction pertaining to Wheeler's testimony:

> You have heard Jennifer Wheeler's opinion about the behavior of sexually-abused children. You should consider that evidence only for the limited purpose of deciding whether [the victim's] acts and words after the alleged crime are consistent with those of sexually abused children. That evidence cannot be used to show that the crime charged here was committed or that the defendant committed it, nor can it be considered an opinion by Jennifer Wheeler that [the victim] is telling the truth.

In addition, while Wheeler provided the brief general statement that kids do not typically lie about sexual abuse, Wheeler also testified that children under the age of eight "are more suggestible than someone over eight" and on cross-examination confirmed that "there's a high suggestibility when it comes to" children under age eight and that "research has found that children that young can be manipulated." Therefore, Wheeler's testimony did not exclusively favor the prosecution, supporting our conclusion that its admission was not improper. See *People v Peterson*, 450 Mich 349, 377-379; 537 NW2d 857, amended 450 Mich 1212 (1995) (any error in permitting the expert testimony was harmless given that it did not exclusively favor one side over the other).

Accordingly, we conclude that the trial court did not err when it permitted Wheeler's expert testimony in this case. Similarly, because there was no error in admitting the testimony, defendant's counsel was not ineffective when he chose to not object to the testimony. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). Finally, we conclude that the brief reference to Wheeler's testimony during the prosecution's closing argument was not improper. "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but []he is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

Affirmed.

/s/ Christopher M. Murray
/s/ Mark T. Boonstra